No. 2502

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR LAKE (a corporation),

Appellant,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L. STEPHENS, JOSEPH CRAIG and YOLO WATER AND POWER COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEES.

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FRANK D. MONCKTON, Clerk.

By .....*Deputy Clerk.*

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Statement of Facts.

In 1908, the Central Counties Land Company, hereinafter referred to as the Land Company, was the owner and in possession of certain land in Lake County, California. The Land Company borrowed $3000 from the appellee Stephens, and as part of the same transaction, executed and delivered to Stephens a deed of said land, absolute in form, but solely for the purpose of securing the repayment of its loan. Contemporaneously, and as part of the

same transaction, Stephens executed a defeasance to the Land Company. In this contract of defeasance Stephens agreed to reconvey the mortgaged property to the mortgagor upon repayment of the $3000 with interest.

The bill to redeem contains several other averments which in no wise affect the jurisdictional question. They are adverted to here simply that we may have the entire situation before us, and are as follows: The Land Company remained in possession. Stephens executed a purported deed of the land to appellees J. L. Stephens and Joseph Craig, and they, in turn, purported to convey to the appellee Yolo Water and Power Company. All the said grantees took with knowledge of the original mortgage.

This then was the situation in 1913. The Land Company, *a California corporation,* had mortgaged its land to Stephens, a *citizen and resident of California,* to secure the repayment of a loan of $3000. On April 9, 1913, the Power & Irrigation Company of Clear Lake, appellant herein, was organized as an *Arizona corporation.* The Land Company *assigned its equity of redemption, or its rights under the contract of defeasance with Stephens,* to appellant. On June 12, 1913, appellant, plaintiff below, filed this bill to redeem. The prayer asks that the deed from the Land Company to Stephens be adjudged a mortgage, for an accounting, and for the removal of several clouds on appellant's title.

Argument on the Law.

It will be noticed that the facts in the case at bar are almost identical with those in the companion case of *"Power and Irrigation Company of Clear Lake v. Capay Ditch Company et al.,"* No. 2500, with the exception that the mortgage is accompanied by a distinct contract of defeasance on the part of the mortgagee. As the questions involved here are fully discussed in our brief in No. 2500—which is here on appeal and is to be heard by the Court along with this appeal—, we respectfully refer the Court to said brief for a full discussion of the law applicable here.

Appellant, in its reply brief in this case, has likewise referred the Court to its brief in No. 2500, and in addition has appended a skeleton synopsis of its points to establish the jurisdiction of the District Court in this case. We therefore propose to take up and consider these points *seriatim*.

Appellant states his position thus: this suit is not brought by an assignee to recover upon a chose in action, but by the grantee of real property to remove a cloud from his title. The steps whereby appellant reaches this conclusion are as follows:

> 1. "The deed having been given merely as security was a mortgage, no matter what its terms."

We will concede this point. The Land Company and Stephens entered into a contract of mortgage. The Land Company *conveyed* its land by *deed abso-*

lute to Stephens, intending the deed merely as security for the payment of the debt. This constitutes a mortgage under the system prevailing in California.

We might here observe that the very reasoning the California Courts employ to unmask the real relations of grantor and grantee where they go through the forms of conveyance simply to secure the payment of a debt, is applicable to the situation in the case at bar. Appellant stoutly maintains that the relation between the Land Company and itself is that of grantor and grantee, that the rights which appellant obtains through "mesne conveyance" from the Land Company are *independent of contract;* but this Court, as do the California Courts, will look behind the averments of appellant's bill and disclose to light the fact that appellant is in reality but the assignee of a pre-existing chose in action, and in attempting to maintain this action is but seeking to accomplish the very mischief which Section 24 of the Judicial Code was enacted to prevent.

> 2. "The defeasance or contract, no matter what its terms, does not change the character of the deed."

We will concede this point. The contract of defeasance is but an express declaration of the true status of the Land Company and Stephens, showing them in their true light as parties to a contract of mortgage.

3. "Being, therefore, a mortgage, it must be noted that in California, no title passed by it."

This point also we will concede.

4. "The cause of action here sued on accrued prior to January 1, 1912, and the jurisdiction is to be determined by the Judiciary Acts of 1887-8 and not by Section 24 of the present code."

This proposition we must deny. It becomes important to determine whether the question of jurisdiction is controlled by the Judiciary Acts of 1887-8 or by the Judicial Code of 1912, because it is evident that Congress in changing the clause "to recover the *contents* of a chose in action" to the clause "to recover *upon* a chose in action" performed no idle act, but intended that Section 24 of the Judicial Code should be amenable to a more liberal and comprehensive interpretation than that accorded previous acts.

The appellant contends that as the cause of action accrued prior to January 1, 1912, the Judicial Code of 1912 cannot govern the right of appellant to maintain this action, though appellant's right *did not accrue to it by assignment until 1913.* The cases relied on by appellant do not support this contention.

McKernan v. North River Sus. Co., 206 Fed. 984, was an action involving but $2500, pending at the time of the passage of the Judicial Act of 1912 fixing the jurisdictional amount at $3000. The juris-

dictional amount prior thereto was fixed at $2000. The Court very properly decided that it did not lose jurisdiction.

This case has no application here. In the case at bar, the only parties to the action *prior to 1912* were the Land Company and the Ditch Company. Obviously, the Federal Courts had no jurisdiction because the necessary diversity of citizenship was lacking. After the Judicial Code of 1912 went into effect, the Land Company assigned its right of action to the appellant, an Arizona corporation, for the purpose of conferring jurisdiction on the Federal Courts. It is too clear for argument that the Judicial Code of 1912 governs; and denies appellant the right "to recover *upon* (this) chose in action" when its assignor could not sue thereon.

The other cases referred to on page 6 of appellant's brief are of like effect and may be similarly disposed of.

> 5. "The Acts of 1887-8 which prohibit the Federal Court from taking jurisdiction of suits by assignees to recover on any promissory note or other chose in action, have no reference to a suit by the grantee of lands to remove a cloud from his title."

To this point we reply that no Federal cases can be found as authority therefor and the fact that the California cases decide that a mortgagor, after the debt is outlawed and the lien extinguished, must proceed to quiet title and can no longer redeem from a mortgage, cannot affect the jurisdictional ques-

tion here involved. However, the action may be denominated it is none the less an action to enforce specific performance of a contract and it is clear by abundant authority that Section 24 of the Judicial Code applies to such actions.

Corbin v. Black Hawk Co., 105 U. S. 659; 26 L. ed. 1136;

Shoecraft v. Bloxham, 124 U. S. 730; 31 L. ed. 574;

Plant Investment Co. v. Jacksonville, etc. Ry. Co., 125 U. S. 71.

6. "This bill to redeem is in reality a bill to remove a cloud from title. Such a bill is not a suit to recover upon a chose in action."

This point is substantially the same as point (5) and the answer in reply thereto applies here.

In conclusion, we submit that appellant, in this bill to redeem, is suing "to recover upon a chose in action" within the meaning of Section 24 of the Judicial Code, and as appellant's assignor could not maintain such action, appellant is likewise precluded.

We ask that the order of the District Court dismissing the bill for want of jurisdiction be affirmed.

Dated, San Francisco,
March 10, 1915.

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